



REPUBLIC OF KENYA



**Republic v Kinyua (Criminal Case 3 of 2019)  
[2023] KEHC 20145 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20145 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL CASE 3 OF 2019  
FN MUCHEMI, J  
JULY 13, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**MARTIN THUMBI KINYUA ..... ACCUSED**

**JUDGMENT**

1. The accused person faces a charge of murder contrary to Section 203 as read with S 204 both of the *Penal Code*. The particulars of the charge are that on the September 23, 2018 at Kiangima village, Githima sub location, Ruthagati Location, Ngorano Division, Mathira West sub-county, within Nyeri County murdered Patrick Mukaru Njoroge.
2. At inception, this case was heard by Ngaah J who heard 7 prosecution witnesses. Directions under Section 200(3) of the *Criminal Procedure Code* were taken and the accused opted to proceed from where the former trial judge had reached. This court took over the case and heard 4 prosecution witnesses as well as the defence case.
3. The evidence of the prosecution was that on September 23, 2018, the deceased was seen with the accused person's five year old daughter. The deceased had removed his trousers and those of the child as well. He then ran behind a cow shed to hide when he was spotted by PW1 as she was on her way back from buying vegetables. The witness then informed the child's mother of what she saw and that is when the accused person came out of the house, asked her about the deceased's whereabouts and went to him carrying a piece of firewood that he used to hit the deceased. The accused person tied the deceased to an electric post and continued hitting him and at some point attempted to pour paraffin on him but he was stopped by witnesses who had gathered at the scene. The accused thereafter took the deceased to Kiamachibi Police Station where he reported that there was a case of mob justice against the deceased and that the deceased had sexually assaulted his daughter. The accused thereafter took the deceased to hospital where the deceased succumbed to his injuries.



4. The accused was later arrested and taken for mental assessment to Dr Richu Mwenda who declared him fit to plead.
5. Post mortem of the deceased's body was conducted by Dr Stephen Nderitu and he formed the opinion that the deceased died as a result of severe head injuries secondary to multiple blunt trauma to the head.
6. Upon being put on his defence, the accused person elected to give a sworn testimony and called two (2) witnesses. He stated that on the material day, he was at his home with his wife when he heard the house girl screaming. He ran to where he was and found her dressing his five year old daughter and the deceased running away and some people rushing to the scene. The house girl told him that the deceased had attempted to defile his daughter and he took her back to the house and left her with his wife. He then rushed outside where he found the deceased was being attacked by around 10 people among them PW1, PW2, PW3 and PW4. The accused did not beat the deceased but rescued him and took him to the police station and then to the hospital.
7. The two defence witnesses DW2 and DW3 said they did not see what transpired during the assault of the deceased. DW2 the wife of the accused said she was in the house and did not leave as she was still recovering having given birth a few days earlier. DW3, the mother of the accused person was in church when the assault on the deceased occurred.
8. The prosecution and the defence filed their submissions in this case which the court has perused and considered in this judgment.
9. The prosecution cited the case of *Republic vs Albert Tirimba Ogata [2014] eKLR* and submitted that it has proved its case beyond reasonable doubt. The prosecution submitted that PW1 – PW4 all placed the accused at the scene of the crime. Further, the accused, in his defence, placed himself at the scene of the crime despite recording a statement at the police station after the incident, denying that he was at the scene of the crime. The prosecution thus submitted that the accused person is an untruthful witness because his statement which he recorded at the police station contradicts his testimony in court.
10. The prosecution further submitted that the prosecution witnesses testified that the accused was the sole assaulter of the deceased whereas it is only the accused who alleged that the deceased was assaulted by a mob. The wife of the accused DW2 was not at the scene of the crime could not testify to the fact that it was a mob that assaulted the deceased. DW3, the mother of the accused could also not tell who assaulted the deceased because she was not at the scene at the material time. The statement recorded by Faith Murugi Kariuki, a house help of the accused seems to corroborate the evidence of the accused that the deceased was assaulted by a mob. However, the prosecution submitted that the said statement contradicts the evidence of the accused because while Faith in her statement states that the accused was not at home at the time of the incident, the accused person said he was at the scene. The prosecution further urged the court to disregard the statement by Faith as being untruthful, as she was never called as a witness and therefore the prosecution did not have an opportunity to cross examine her.
11. The prosecution further relied on Section 203 and 204 of the Penal Code and submitted that the evidence of malice aforethought is evident when he armed himself with a piece of firewood which he used to beat the deceased. PW1, PW2, PW3 and PW4 testified that they saw the accused hit the deceased repeatedly with the piece of firewood and at some point the accused wanted to pour paraffin on the deceased with the intention of burning him. He was only stopped from doing so by the witnesses who were at the scene. The prosecution further submitted that the magnitude of the injuries inflicted on the deceased by the accused indicate that he intended to kill him. The post mortem report showed that the deceased died as a result of severe head injuries secondary to multiple blunt trauma to the head.



The prosecution submitted that the accused aimed for the deceased's head which is a delicate body part which evidently shows his intent of killing the deceased.

12. The prosecution further submitted that there was evidence of unlawful acts on part of the accused as PW1, PW2, PW3 and PW4 testified that they saw the accused hit the deceased with a piece of wood on the head.
13. The prosecution submitted that the accused was accurately identified by PW1, PW2, PW3 and PW4 who were his neighbours and knew him very well. Furthermore, the accused person in his defence, confirmed that he knew the said witnesses since they were his neighbours. The prosecution further submitted that the incident happened during the day and the lighting was proper.
14. The defence submitted that the prosecution had failed to prove its case beyond a reasonable doubt. He raised the issue of credibility of the witnesses PW1 – PW4 who are all relatives and further submitted that the evidence of PW1 – PW3 are totally inconsistent and contradictory and when compared with that of PW4 the same is at variance. The defence further submitted that it is suspicious why no police officer from Kiamachibi Police Station was called as a witness to testify yet the accused reported the incident in the said police station. Further, the defence raised queries as to why no police officer visited the scene of the crime, why it took the investigating officer nine months to arrest the accused person and why the investigating officer did not charge the accused with giving false information to him pursuant to Section 135 of the Criminal Procedure Code. The defence relied on the case of *Nanyuki HC Criminal Case No E011 of 2021 Republic vs Collins Ndung'u Kinyua & 4 Others* and submitted that there is no evidence that the accused is facing a charge of giving false information to a public officer in any court. The defence urges the court to weigh the evidence after it has had the advantage of seeing and hearing the accused, his wife and mother testify on the happenings of that date. Further, the court has had the opportunity of scrutinizing the written statement of the house help, one Faith, which was produced as defence exhibit one. The defence argues that it is evident that the deceased was attempting to defile the female child of the accused and he was caught red handed by the house help who raised an alarm. Thereafter, the deceased was subjected to mob justice and beaten up only to be rescued by the accused and taken to Kiamachibi Police Station and later to Karatina hospital where he died.

### **The Law and Analysis**

15. The burden of proof in criminal cases lies on the prosecution to establish that the deceased's death was a result of the unlawful act of the accused person. The prosecution must prove the primary ingredients of the offence of murder namely:-
  - a. That the deceased died as a result of the unlawful act of the accused;
  - b. That the accused person has been positively identified and placed at the scene of the crime;
  - c. That the unlawful act was actuated by malice, rather that malice aforethought existed on part of the accused person.
16. Upon the death of the deceased, PW8 Dr Stephen Nderitu conducted an autopsy on the deceased. The post mortem report shows that the cause of death was severe head injuries secondary to multiple blunt trauma to the head. The death and cause of death have been established by the prosecution herein.

### **Whether the accused caused the death of the deceased by either an unlawful act or omission.**

17. PW1 and PW4 testified that they saw the accused person hit the deceased with a piece of wood on the head. PW2 and PW3 testified that when they arrived at the scene they found accused, PW1 and the deceased who was lying down already injured. The witnesses said that the deceased was bleeding



from the eye and he was not in a position to speak. Furthermore, PW1, PW2, PW3 and PW4 testified that they saw the accused person pouring paraffin on the deceased. PW1 and PW4's testimonies are consistent with the post mortem evidence which indicated that the cause of death was due to severe head injuries secondary to multiple blunt trauma to the head. Furthermore, the testimonies by PW1, PW2, PW3 and PW4 and defence of the accused person as well as the evidence of DW2 squarely place the accused person at the scene.

18. The accused person raised his defence that he did not beat the deceased and said that the deceased was assaulted by a mob. The statement recorded by his house help at the time one Faith Murugu Kariuki was produced in defence. In her statement, the witness stated that the accused person was not at home but was at Rititi Shopping Centre. He rushed home and took the deceased to the police station. This witness statement contradicts the testimony made by the accused person who testified that he was home with his wife on the material day, when they heard screams from the house help. The accused person then testified that he rushed to the scene and found the house help dressing his daughter. He took his daughter back to the house and when he went back to the scene, he found a mob of people beating the deceased. The injuries sustained by the deceased were only on the head. PW8 testified that the deceased had no other injuries externally which is not consistent with assaulting by a mob. Had the deceased been assaulted by a mob, he would have sustained multiple injuries not only on the head but on other parts of the body.
19. The evidence of PW1 was that he was at the scene in the compound of the accused when the accused came out of his house after learning that the deceased had been spotted having removed his trouser and having already removed that of the child. The accused immediately took a piece of firewood and hit the deceased on the eye injuring him badly. One Kennedy and accused's wife tried to intervene but the accused ignored their pleas and continued to beat the deceased. The deceased was injured on his left-eye, behind his head and on the left arm. PW1 further testified that Kennedy (PW3) and Irene (PW2) who came to the scene did not assault the deceased. He solely assaulted the deceased for about one hour before his mother came to the scene.
20. By the time PW2 went to the scene, the deceased had already been assaulted on the eye but she found the accused lying on top of the deceased still assaulting him. Accused went for a hurricane lamp from his house and attempted to pour paraffin on the deceased but PW3 prevented him by knocking off the lamp from accused's hand. At that time, the clothes of the accused were soaked with blood.
21. The evidence of PW1 was corroborated by that of PW2 and PW4 who witnessed further assault on the deceased as well as the attempt to pour paraffin on the deceased. None of the witnesses talked of a mob having assaulted the deceased. As such, the defence of the accused that it was a mob consisting of PW1, PW2, PW3 and PW4 who assaulted the accused was untrue. It is important to note that the investigating officer PWII also came to the same conclusion that it was only the accused person who assaulted his worker to death using a piece of wood.
22. The accused person was identified as a person known to PW1, PW2, PW3 and PW4 all who testified that they were his neighbours. Thus identification of the accused was by recognition which is more reliable than identification. The accused was therefore positively identified at the scene.
23. The defence claimed that the evidence of the key prosecution was contradictory, the defence did not explain the contradiction or discrepancies they claimed existed. I have analysed the evidence of PW1, PW2, PW3 and PW4 who all placed the accused at the scene and I am of the considered view that there were no discrepancies. Indeed, it was the accused's defence that had major contradictions as to whether or not he was at home when the incident occurred as he told the court, or whether he was at Rititi Shopping Centre where he was telephoned to come home as was stated by his house girl.



The evidence of the key witnesses PW1, PW2 and PW4 was overwhelming and was not shaken by the defence case.

24. I have carefully considered the evidence of the prosecution and the defence of the accused. I am of the considered view that the prosecution have proved that the deceased died of the unlawful act of the accused.

### **Whether the accused had malice aforethought**

25. Section 206 of the Penal Code stipulates that malice aforethought is deemed to be established by evidence when any of the following circumstances are proved:-
- a. An intention to cause the death of another.
  - b. An intention to cause grievous harm to another.
  - c. Knowledge that the act or omission causing death will probably cause death or grievous harm to someone, whether that is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
  - d. An intent to commit a felony.
  - e. An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.
26. The prosecution have a duty to prove malice forethought on part of the accused, that is at the time he inflicted the injuries on the deceased, he formed the necessary intention to either cause death or grievous harm on the deceased. The prosecution adduced evidence of the doctor in form of the post mortem report. It was evident that severe injuries were inflicted on the deceased that caused his death. However, I find it important to ask why the deceased was assaulted. From the defence of the accused, that of PW1 and the statement of his housegirl, it came out that the minor daughter of the accused had been undressed by the deceased when PW1 arrived at the scene with the aim of sexually assaulting her. But this move did not progress to attempted defilement as the accused informed the police at Kiamachibi Police Post. PW1 was very clear that no defilement took place but he witnessed the accused having removed his trouser and that of the minor. The arrival of the housegirl at the scene may have interrupted the act of the accused which stopped him from executing his intention. As such, when the accused learnt of it, he was devastated as a young father of a minor aged five (5) years. Instead of handling the matter in a sober manner, the accused seems to have been provoked by the act of the deceased and he proceeded to beat him up which resulted in his death. Although the accused did not take this line of defence, the court is convinced from the evidence on record that before PW1, PW2, PW3 and PW4 went to the scene the accused acted in the heat of passion to defend his minor child.
27. It is my view that the circumstances surrounding the offence are such that an act of that kind would in some cases be expected to result given the fact that a parent and especially a father would be very protective of his minor daughter.
28. Despite the grave nature of injuries inflicted, the court is convinced that the accused acted in the heat of passion that gave no room of forming the necessary intention to kill the deceased. I reach a conclusion that the prosecution did not prove the element of malice aforethought on part of the accused.

### **Conclusion**

29. I find the accused guilty of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.



30. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 13<sup>TH</sup> DAY OF JULY, 2023.**

**F. MUCHEMI**

**JUDGE**

Judgement delivered through video link this 13<sup>th</sup> day of July 2023

